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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 164.

PINK FRANKLIN, PLAINTIFF IN ERROR,

vs.

THE STATE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

SUPPLEMENTAL BRIEF IN BEHALF OF DEFENDANT IN ERROR.

J. FRASER LYON,
Attorney-General.
D. S. HENDERSON,
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B. H. MOSS,
Of Counsel,

(21,183.)

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Supplemental Brief in Behalf of Defendant in Error.

Estoppel.

It is insisted that the people of the State of South Carolina are estopped in law from asserting the provisions of qualified suffrage which their delegates have adopted and inserted in the Constitution of 1895 by the fact that the act of Congress passed on June 25, 1868, permitted South Carolina and like States, in the rehabilitation of their governments, to have representation in Congress upon the foundamental condition "That the Constitution of neither of said

States shall ever be so amended or changed as to deprive any citizen, or class of citizens of the United States of the right to vote in said States, who are entitled to vote in the Constitution thereof herein recognized," and because the Constitution of South Carolina of 1868 therein recognized used universal suffrage as the basis of the suffrage article. We contest this position.

What is this argument? Simply this: That the Congress of the United States, which was inhibited by the Constitution of the United States from placing any such condition upon a sovereign State, can pass an act which, if acquiesced in by a sovereign State to any extent or to a considerable extent, will amount to an estoppel, and consequently that which is prohibited constitutionally will become law by acquiescence. We say that there is no such doctrine that should be sustained by the Supreme Court of the United States. It is true as between individuals estoppel can arise by deed, by record, and even by conduct, and we do not go to the extent of claiming (though the authorities are in conflict) that a State cannot be estopped by an authorized contract; by a contract which is constitutional and which is not against public policy, but we do claim that a State, that is, the people of a State, cannot be estopped from asserting a right inherent in them because a legislative body, such as the Congress of the United States of America, whose powers are delegated and limited by the instrument, expressed or implied, endeavors to place a condition upon their future action, upon which condition they have never acted, but simply gone on in a discharge of their duties, and in the natural development that civilization and progress gives them, and then acted for the betterment and uplift of their entire people. Judge Cooley in his Limitations, 7th ed., p. 106, says:

> "Acquiescence for no length of time can legalize a clear usurpation of power where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed,

and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing, or without any one sufficiently interested in the subject to raise the question, but these circumstances cannot be allowed to sanction a clear infraction of the Constitution."

We submit the following cases of the Supreme Court of the United States bearing upon the subject:

Filor *vs.* United States, 9th Wallace, p. 45. That case was an appeal from a decision of the Court of Claims in which Filor brought a claim against the United States under the act of Congress of July 4, 1864, 13th Statute at Large, p. 381, which gave jurisdiction to said court to consider claims against the United States growing out of the destruction or appropriation of or damage to the property by the army or navy during the war. The officers of the Government at Key West, Florida, who had charge of the appropriation of property for the use of the army entered into a lease of premises for the use of the quartermaster's department, but according to a regulation of the Government it was not binding upon the Government until approved by the quartermaster general. The Supreme Court, speaking through Judge Field, held that the entering into this lease and the appropriation of property under it, was such an appropriation as was contemplated, but as the regulations declared that the lease should be approved by the Quartermaster General, and it was not so approved, that it was an invalid lease. Filor's attorneys contended that if this was so, the doctrine of estoppel applied to the Government, because it had accepted the lease and the fruits of the lease, but the court held otherwise, and speaking of the acts of the officers representing the Government said "their unauthorized acts cannot estop the Government from insisting upon their invalidity however beneficial they may have proven to the United States." In 20th Wallace, 663, we find the case

of the Loan Association against Topeka, in which the opinion of the court was delivered by Mr. Justice Miller on the same line. A statute had authorized the town to create certain obligations payable in money, but the legislature under the Constitution had no authority to create these debts, yet the bonds were issued and the municipal government had acquiesced in the act of the legislature authorizing the issue by paying the interest on the bonds for several years. Judge Miller says:

> "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branch of these governments are of limited and defined powers. These are limitations on such power which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

And he further says:

> "We do not attach any importance to the fact that the town authorities pay instalments of interest on these bonds. Such a payment works no estoppel, for the legislature was *without power* to authorize the issue of these bonds, and its statute attempting to confer such a power is void. The mere payment of interest, which was equally unauthorized, cannot create of itself a power to levy taxes resting on no other foundation than the fact that they have once been illegally levied on for that purpose."

McCormick *vs.* Market Bank, 165 U. S., page 538. In this case a national bank which was by statute prohibited "to transact any business except such as was incidentally and necessarily preliminary to its organization until it was authorized by the Comptroller of the Currency to commence the business of banking," entered into a certain lease of property for its banking office before it was authorized by

the Comptroller of the Currency to commence its business, and the Supreme Court held that such a lease was without authority, and though the bank had received profit from the use of the office and benefit, it was held that no estoppel could arise and a stockholder could question the same, Judge Gray saying (page 553):

> "The lease sued on having been executed by the defendant, contrary to the expressed prohibition of the statute, which peremptorily forbade the corporation to transact any business unless to perfect its organization, and thus denied it the capacity of entering into any contract whatever, except in perfecting its organization, the lease is void, cannot be made good by estoppel, and will not support an action to recover anything beyond the value of what the defendant has actually received and enjoyed."

We think the case of Missouri against Illinois, 180 U. S., page 212, is pertinent and to the point. In this case a sanitary district of Chicago, acting under the authority of the State of Illinois, established a system of drainage by which the filth of the city of Chicago, through the Illinois River, was cast into the great Mississippi River and infected and polluted the waters of the river so that it became obnoxious to the citizens of the State of Missouri, and said State, in its own name, brought the action against the State of Illinois and the sanitary district in the original jurisdiction of the Supreme Court of the United States. Other interesting questions arose in the case, but one question was that the State of Missouri was estopped by acquiescence of its citizens in this unlawful action on the part of the State of Illinois and this sanitary district in polluting the waters of the Mississippi River, and the Supreme Court held that acquiescence could not estop the State because such right was carried on contrary to law and equity, and an injunction was granted.

When we apply these considerations set forth in these authorities (and they could be multiplied), we insist and

submit that South Carolina cannot be estopped from asserting the rights given her in the Constitution of the United States to regulate her suffrage. She could not prevent Congress from passing the act in question. Congress had no power to put these conditions upon her; it could allow her representation by putting any conditions which the Constitution of the United States authorized Congress to do, but beyond that it could not go.

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